

## INTRODUCTION

The Utah Sentencing Commission, pursuant to its statutory authority and responsibility under Utah Code Ann. § 63-25a-304, promulgates the following 2004 Adult Sentencing and Release Guidelines for adult criminal offenders.

The Utah Sentencing Commission is charged to recommend and coordinate sentencing and release policy for both juvenile and adult offenders within the state of Utah. It consists of twenty-seven members who represent all facets of the justice systems: judges, prosecutors, defense attorneys, legislators, victims, law enforcement, treatment specialists, ethnic minorities, corrections, parole authorities, and others.

### Changes from the 1998 Guidelines

The 2004 Adult Sentencing and Release Guidelines include no changes to Form 1 (General Matrix), Form 2 (Sex Offender Matrix), or Form 3 (Aggravating and Mitigating Circumstances Associated With Mandatory Imprisonment Sentences). Form 4 (Aggravating and Mitigating Circumstances) now includes an additional aggravating circumstance for financial or theft crimes. Consistent with prior practice, the lists of aggravating and mitigating circumstances are not exhaustive.

Addendum B, which categorizes felony offenses, has been updated to include offenses previously omitted and offenses enacted by the legislature since the implementation of the 1998 Guidelines.

Finally, the text of the manual has been updated and revised, although it remains essentially the same as the 1998 Guidelines.

## Philosophy Statement

The goal of the guidelines is to bring more objectivity to the sentencing and release process yet also allow the court or the Board of Pardons and Parole discretion in considering aggravating and mitigating circumstances. The guidelines provide for consideration of the following factors:

- Severity of the offense;
- Utah penal statutes;
- Crime history and risk to society;
- Prosecutorial, judicial, and parole board discretion; and
- Continuum of sanctions

Sanctions should be proportionate to the severity of the current offense. Guidelines should reflect the culpability of the offender based on the nature of the current offense and the offender's role coupled with the offender's supervision history and overall likelihood to recidivate as inferred by the offender's "Criminal History Assessment." The Adult Sentencing and Release Guidelines reflect these basic concepts of justice.

Criminal punishment should focus on the particular circumstances of each crime, offender, and victim involved. Guidelines should promote uniformity while, at the same time, afford the sentencing judge and Board of Pardons and Parole the flexibility to fashion a specific sentence to an individual offender. The guidelines facilitate individualized sentences by establishing matrices that include a variety of sentencing options to accommodate a continuum of sanctions such as regular probation, intermediate sanctions, and imprisonment. Aggravating and mitigating circumstances also enhance discretion and encourage individualized sentencing and release decisions.

While decision makers are strongly encouraged to abide by the guidelines,

departures from the guidelines will sometimes be necessary. These departures should be based upon aggravating or mitigating factors, and the Sentencing Commission strongly encourages decision makers to articulate these factors on the record.

### **Statement of Purpose**

The sentencing of criminal offenders is a complex process with many related decision points. For sentencing purposes, the process starts with the prosecutor's decision regarding the specific charges to be filed and what, if any, plea to negotiate. If the defendant is convicted, the judge typically refers the offender to the Department of Corrections for a presentence investigation. The presentence investigator reviews the background of the offender, documents the nature of the offense and its impact on the victim, and then makes recommendations to the judge concerning the sentence to be imposed and any conditions associated with that sentence. See Utah Code Ann. § 64-13-20. The judge then imposes sentence.

A variety of options are available to the judge including an increasing number of intermediate sanctions. The most severe of all sentencing options involve the Utah Department of Corrections. Correctional resources are severely overtaxed and there has been concern about policy to help allocate those resources. The guidelines assist decision makers in the appropriate allocation of these limited resources. If the judge sentences the offender to prison, custody of the offender transfers to the Utah Department of Corrections, and jurisdiction and the decision of how long the offender remains under prison custody transfers to the Board of Pardons and Parole.

### **Guidelines as a Tool**

Utah law provides the basis for the sentencing and release of criminal

offenders. By sound design these statutes allow significant latitude in decision-making. The guidelines are an attempt to further structure decision making relative to sentencing and release, yet still retain the flexibility to deal with individual cases. The guidelines also provide a means of identifying and allocating required resources. Utah's guidelines are intended to maintain judicial and parole board discretion, and at the same time incorporate a rational criminal justice philosophy, eliminate unwarranted disparity, and provide a tool to match resources with needs.

The guidelines, as structured, provide a forum for discussion regarding sentencing and a common frame of reference on which to base discussion. Equally important, they provide a means to look into the future and assess the demand for resources based on policy changes.

### **Action Research Approach**

Although the foundation of the guidelines is sound, they need to be revisited, monitored, and evaluated on a regular basis. One of the primary directions of the Utah Sentencing Commission is to provide this review. The guidelines are not intended to set policy in concrete. Because the philosophy, functioning, and problems of the criminal justice system fluctuate constantly, the guidelines should be adaptable to change, and should even encourage such change. Through general monitoring of how the guidelines are used, they can be modified to accommodate changes in policy or practice.

## **POLICY IMPLICIT IN THE GUIDELINES**

These guidelines are a cooperative venture. No additional legislation is being proposed to coerce agencies to conform. The effort is to provide a mechanism for communication and improvement of key policy rather than to dictate practice by statute or rule. For the guidelines to function well, several policies are important. The policies need not be implemented exactly as stated, but their intent is critical.

### **Prosecution**

Prosecutors may use the guidelines to determine the implications of charging and plea negotiations. The guidelines are intended to make the system predictable by making explicit the sentence an offender with a given background is likely to receive. Prosecutors should make it a policy to explain the effect of charging and plea negotiations in each individual case to the victim.

### **Presentence Investigators**

Presentence investigations should be conducted on all felony convictions and class A misdemeanor sex offense convictions. Presentence investigations are beneficial to the Board of Pardons and Parole as well as to the court and should be completed even when the court may not deem it necessary in a particular case. Presentence investigations should have the guidelines forms attached when they are sent to the sentencing judge, the prosecutor, and the offender in accordance with Utah Code Ann. § 77-18-1 and Utah Code Jud. Admin. Rule 4-203. The recommendations made to the judge should conform to the guidelines unless aggravating or mitigating circumstances are documented.

### **Sentencing Judges**

Sentencing judges may require that the guidelines forms be attached to all district court presentence investigations. Judges are encouraged to sentence within the guidelines unless they find aggravating or mitigating circumstances justifying departure. These circumstances should be stated in open court and included on the judgment and commitment order.

In order to assist judges in sentencing, Utah law provides for a possible diagnostic evaluation. "In felony cases where the court is of the opinion imprisonment may be appropriate but desires more detailed information as a basis for determining the sentence to be imposed than has been provided by the presentence report, the court may in its discretion commit a convicted defendant to the custody of the Department of Corrections for a diagnostic evaluation for a period not exceeding 90 days." Utah code Ann. § 76-3-404. Such a referral involves the use of scarce resources and should be reserved for an in-depth review and assessment to provide the sentencing judge with the necessary information to make the appropriate sentence. This statutory authority and accompanying resources are intended to enhance the assessment capabilities in sentencing and are not intended to provide shock incarceration for the offender. When seeking to supplement a presentence report with a psychological evaluation, the court may also consider community resources other than the diagnostic unit at the Department of Corrections.

### **Board of Pardons and Parole**

The Board of Pardons and Parole requires an updated guidelines form to be completed on each offender appearing for an original parole grant hearing. In many cases, additional events have occurred between the time of the court's first sentencing decision and the first

appearance before the Board (e.g., new convictions, program successes or failures, escapes, etc.). Except where there are aggravating or mitigating factors, the Board is encouraged to make decisions compatible with the guidelines. A statement of general rationale for Board decisions is provided to the offender and made available to the public.

## Utah Sentencing and Release Guidelines Instructions

Under the direction of the Utah Sentencing Commission, these 2004 Adult Sentencing and Release Guidelines represent a cooperative effort by all the components of the Utah criminal justice system to make a unified statement of policy regarding the sentencing and release of adult criminal offenders. The dominant underlying philosophy of the guidelines is that criminal sentences should be proportionate to the seriousness of the offense for which the offender was convicted. Other major policies are inherent in the guidelines. These are the offender's overall culpability based on the nature of the current offense and the offender's role coupled with the supervision history and likelihood to recidivate, as inferred from the offender's criminal history. The guidelines provide predictability by communicating a standard in sentencing and releasing and thereby allow all parts of the system to have a good idea of the disposition and penalty associated with the conviction.

Except for consecutive and concurrent enhancements, all statutory sentencing enhancements are not included in the context of these guidelines. For example, Utah law concerning repeat and habitual sex offenders, Utah Code Ann. § 76-3-407, or gang enhancements, Utah Code Ann. § 76-3-203.1, are to be considered outside and in addition to these guidelines.

### Form 1 – General Matrix

#### Criminal History Assessment

The purpose of the Criminal History Assessment is to provide a standard frame of reference to reduce or enhance the severity of the sentence based on the prior criminal and supervision history of the offender. Only score the single highest

point option within a given category. Do not check multiple scores in a single category and then add them.

#### *Prior Adult Felony Convictions*

Do not count the current offense or offenses. Prior felony convictions are limited to adult convictions. Only convictions should be counted. Other instances such as dismissed cases, intelligence information, numerous prior arrests, etc. may be considered in the aggravating and mitigating circumstances section but are not quantified in the guidelines. Where military records are available, court martial information should be included if the charges are criminal in nature.

Utah law defines "single criminal episode" as "all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective." Utah Code Ann. § 76-1-401. If multiple convictions arise from a single criminal episode, as statutorily defined, only one conviction should be counted.

#### *Prior Adult Misdemeanor Convictions*

This item is scored similarly to the one above. Traffic crimes should be excluded with the exception of DUI and reckless driving convictions.

#### *Prior Juvenile Adjudications*

This item specifically scores the juvenile record. Only adjudications that would be criminal convictions if committed by an adult should be counted; do not count status offenses. Such adjudications should be calculated in the same manner as generally explained in the Prior Adult Felony Convictions and Prior Adult Misdemeanor Convictions categories. Only those cases that resulted in a finding of delinquency should count. In other words, some adjudication of guilt in the juvenile system

must be found before points are allotted here. Care must be exercised since not every entry on a juvenile record represents an adjudication.

For purposes of calculating in this category, three misdemeanor offenses equal one felony. Do not “round up” in these cases, i.e., less than 3 misdemeanors = 0 felonies; 3 – 5 misdemeanors = 1 felony; 6 – 8 misdemeanors = 2 felonies, etc. Status offenses are offenses that would not be illegal if committed by an adult, e.g., truancy or smoking.

The final option in the prior juvenile adjudications category indicates that four points are awarded if the offender experienced a secure placement in the juvenile system. Only a commitment to secure care qualifies for this option.

#### *Supervision History*

This item encompasses both juvenile and adult history. Only post-adjudication or post-conviction supervision should be counted. Pre-trial detention or jail, for example, would not constitute supervision history for these purposes. The term “revocation” includes situations where findings of fact hearings have demonstrated that the conditions of supervision had been violated, but the judge or Board of Pardons and Parole chose to continue supervision without revocation. The item entitled “act occurred while under current supervision or pretrial release” refers to the situation at the time the offense occurred. For points to be assigned in this Supervision History category, both the prior and present offenses should be criminal in nature. Traffic violations and status offenses for juveniles certified to the adult system should not be counted.

#### *Supervision Risk*

This item penalizes those who have absconded or escaped from court ordered

supervision in the past, as either a juvenile or an adult. The more restrictive the supervision, the greater the penalty. Those who “fail to report” for court, presentence investigation, or supervision, receive one point. “Absconding” is when an offender leaves the facility without permission; or fails to return at a prescribed time. If an offender is under supervision, absconding occurs when he changes his residence . . . without notifying his parole officer or obtaining permission or when the offender, for the purpose of avoiding supervision: hides at a different location from his reported residence; or leaves his reported residence. Absconding receives two points if the placement is non-residential and three points if the supervision is residential in nature. Scoring points for absconding does not require a conviction because absconding is not a crime.

“A prisoner is guilty of escape if he leaves official custody without authorization.” Utah Code § 76-8-309(1). If the offender “escapes” from a secure (locked door or secure perimeter) confinement setting, four points are allotted. Only convictions for escape should be counted unless the offender could have been charged with escape or absconding but was, instead, charged or convicted of another crime while on escape status.

#### *Violence History*

This category is intended to document any violence that may have accompanied any prior criminal offense(s). Only count prior convictions. The guidelines contain a graduated scale of points to be allotted depending upon the past violent offense. One point is allotted for a misdemeanor, two points for a third degree felony, three points for a second degree felony, and four points for a first degree felony as indicated on Forms 1 and 2. Other incidents of documented violence that are not convictions in and of themselves



may be considered under Form 4 - Aggravating and Mitigating Circumstances.

#### *Weapons Use in Current Offense*

In addition to the violence history category of the criminal history assessment, the guidelines emphasize the use of a weapon *in the current offense(s)* as a factor that may increase the criminal history score. Do not consider this category for any prior convictions as is the case in all other criminal history categories. This category is also to be considered only when the current conviction does not reflect the use of the weapon or when there is no statutory weapons enhancement involved. For example, if it is apparent that the offender was convicted of first degree felony aggravated robbery instead of second degree robbery because of the use of a weapon; do not additionally consider this category. Likewise, if an offender receives the dangerous weapons enhancement, do not additionally consider this category.

The point allocation in this category depends upon the use of the weapon: *Constructive Possession*, for purposes of the guidelines, occurs when the offender has access to the weapon but it is not on his or her person. For example, there was a firearm in the glove compartment or a knife in a gym bag in the vicinity. One point is allotted for constructive possession. *Actual Possession*, for purposes of the guidelines, occurs when the offender has the weapon on his or her person. For example, a handgun in a pocket. Two points are allotted for actual possession. *Weapon displayed or brandished* results in three points being allotted. *Weapon actually used* results in four points being allotted. This occurs, for example, when an offender points or fires a gun, uses a knife in close proximity to the victim, or swings a baseball bat. *Weapon used and injury caused* results in six points being allotted, regardless of the seriousness of the injury.

(Again, consider this entire category only if the conviction, itself, does not reflect the weapons use or when no dangerous weapons enhancement is being considered.)

As mentioned, this category is the only occasion when the current conviction is considered in the criminal history portion of Form 1. Otherwise, current convictions are considered only in determining the appropriate column of the matrix or in aggravating and mitigating factors. Admittedly, considering the current conviction in the criminal history assessment creates an anomaly in the guidelines. However, the Sentencing Commission considers the use of a weapon to be such a significant factor in determining both placement and release decisions in sentencing, it is addressed in the guidelines in this manner.

#### *Total Score*

To arrive at this score, add up the points associated with each category in the Criminal History Assessment.

#### *Criminal History Row*

Using the Total Score, identify the appropriate criminal history row: I, II, III, IV, or V using the chart labeled "Criminal History Row."

#### General Matrix

The rows of this matrix represent differing levels of criminal history and correspond with the total score from the criminal history assessment. The columns represent crime categories and correspond with the most serious current offense. The columns list both a felony level and a crime category (murder, death, person, or other). The various levels of shading in the matrix represent suggested dispositions (disregarding aggravating and mitigating circumstances).

The crime category columns *generally* flow from left to right indicating the most severe sanction to the least severe sanction. However, this does not necessarily indicate which crimes are more severe than others. Some cells recommend a more severe placement than the cell immediately to its right (e.g. prison vs. intermediate sanction), but the length of stay may actually be shorter than in the cell immediately to the right.

To determine the guidelines' recommended disposition, locate the cell where the appropriate crime category column and criminal history row intersect. The proper crime category column is based on: (1) the felony level of the most serious presenting offense; and (2) the crime category. Addendum B identifies the specific category for every felony offense (murder, death, person, or other).

If there are multiple current offenses, refer to Addendum A, *Crime Column Listing*, to determine which offense is the most severe and which column should be used. This listing will also indicate which matrix should be used when current offenses include both sex offenses and non-sex offenses.

As indicated earlier, to determine the proper criminal history row, calculate the total criminal history assessment score and use the chart labeled "Criminal History Score" to identify the row that corresponds with that score.

After having identified the proper crime category column and criminal history row, locate the cell where the column and row intersect. That cell includes the guidelines' recommendation regarding sentencing disposition and the typical length of stay if the offender is sentenced to prison. The level of shading in that box identifies the suggested or mandatory sentencing disposition (probation, intermediate sanctions, imprisonment, or mandatory

imprisonment). Split cells containing dual shading indicate that the guidelines recommend either placement.

### *Mandatory Imprisonment*

Utah law mandates imprisonment for all offenders convicted of murder. Utah Code Ann. § 76-3-406. Thus, the guidelines indicate a mandatory imprisonment sentence for murder, regardless of the criminal history row. Murder, Utah Code Ann. § 76-5-203, is the only offense considered in crime category A. Aggravated murder is not considered at all on the Adult Sentencing and Release Guidelines.

Utah law mandates imprisonment for other offenses and mandatory jail for some offenses if the prison sentence is stayed. However, Form 1 – General Matrix does not indicate all mandatory incarceration sentences. Doing so would unnecessarily complicate the matrix when a review of the applicable statute will suffice.

### *Time Enumerated within Individual Cells*

The length of time enumerated within each cell is the typical length of stay if the offender is imprisoned. These times apply only if the offender is sentenced to prison and do not apply if the offender is sentenced to an intermediate sanction or to regular probation. If there is only one active sentence, the typical guideline term is determined by simply identifying the cell where the appropriate crime category column intersects with the criminal history row. The times located within cells found in the mandatory imprisonment shaded area are not mandatory minimums.

In rare cases, the statutory minimum length of stay in prison may be higher than the typical length of stay provided in an individual cell. This will happen only when the statutory minimum for a crime is longer than the usual statutory minimum for that



felony level. For example, a drive-by shooting is a third degree felony punishable by three to five years in prison. It is possible that the typical prison term indicated in the matrix will be less than three years since most third degree felonies are punishable by zero to five years in prison. In cases where the statutory minimum exceeds the typical length of stay provided in the matrix, the typical length of stay should be ignored.

*Consecutive or concurrent*

When multiple offenses are before the court, “[t]he court shall state on the record and shall indicate in the order of judgment and commitment: (a) if the sentences imposed are to run concurrently or consecutively to each other; and (b) if the sentences before the court are to run concurrently or consecutively with any other sentences the defendant is currently serving.” Utah Code Ann. § 76-3-401(1). State statute requires the court to consider the following factors in determining whether sentences shall run concurrently or consecutively:

- Gravity and circumstances of the offenses
- Number of victims
- History, character, and rehabilitative needs of the defendant.

Utah Code Ann. § 76-3-401(2).

“The court shall order that sentences for state offenses run consecutively if the later offense is committed while the defendant is imprisoned or on parole, unless the court finds and states on the record that consecutive sentencing would be inappropriate.” Utah Code Ann. § 76-3-401(3).

If multiple convictions are ordered to run concurrently, the guidelines add 10% of the recommended length of stay of the shorter sentence to the full recommended

length of the longer sentence. For example, consider an offender convicted of aggravated robbery with a recommended length of stay of 7 years (84 months) and also convicted of aggravated assault with a recommendation of 20 months. If the court orders the sentences to run concurrently, the guidelines recommend a length of stay of 86 months ( $10\% \text{ of } 20 \text{ mos} = 2 \text{ mos} + 84 \text{ mos} = 86 \text{ mos}$ ).

If multiple convictions are ordered to run consecutively, the guidelines add 40% of the recommended length of stay of the shorter sentence to the full recommended length of the longer sentence. Using the same example above, if the sentences were consecutive, the guidelines would recommend a length of stay of 92 months ( $40\% \text{ of } 20 \text{ mos} = 8 \text{ mos} + 84 \text{ mos} = 92 \text{ mos}$ ). This same approach applies even if there are three or more sentences being considered.

For another example, consider an offender convicted of robbery and sentenced to prison with a guidelines recommendation of 48 months. The offender is paroled after 36 months and, while on parole, commits aggravated burglary and is sentenced to prison with a guidelines recommendation of nine years. If the judge orders the sentences to run consecutively, the new guidelines recommended sentence is 9 years, 5 months ( $40\% \text{ of } 12 \text{ mos (which is the time remaining on the original sentence)} = 4.8 \text{ mos} + \text{nine years} = \text{approximately 9 years, 5 months}$ ).

If there are a string of multiple offenses that are running consecutively or concurrently, add the applicable percentage of all of the shorter sentences to the longest sentence. For example, consider an offender convicted of 1) aggravated assault with a recommendation of 24 months, 2) a drug offense with a recommendation of 20 months, and 3) forgery with a recommendation of 10 months. If the judge

orders the sentences to run concurrently, add 10% of both the drug offense and the forgery to the 24 months for the aggravated assault. The guideline recommendation would total 27 months (10% of 20 mos = 2 mos; 10% of 10 mos = 1 mos; 2 mos + 1 mos = 3 mos; 3 mos + 24 mos = 27 mos).

Occasionally, the “longer” sentence may not be from the most “severe” offense as indicated by the *Crime Column Listing (by severity)* as explained above. In these exceptional cases, consider the sentence for the most severe offense to be the “longest” sentence for purposes of calculating concurrent and consecutive sentences. This is done to preserve consistency in guidelines application.

All guidelines considerations of concurrent and consecutive sentencing should be consistent with the limitations in Utah Code Ann. § 76-3-401.

### *Conditions of Intermediate Sanctions and Regular Probation*

Intermediate sanctions include any sanction between regular probation and prison. In Utah, courts sometimes attach *special* conditions to a probationary sentence which makes the sentence more than regular probation. For the purpose of the guidelines, typical conditions of probation often include payment of restitution, attendance in counseling, drug testing, search and seizure clauses, community service, etc. These conditions ordinarily do not rise to the level of being *special*, and therefore do not transform regular probation into an intermediate sanction.

The concept of intermediate sanctions is that the higher the risk an offender poses in the community, the more controls are placed on the offender. These controls are intermediate sanctions. They include such things as electronic monitoring, referral to the day reporting centers,

participation in residential treatment programming, intensive supervision, etc. These are the *special* conditions referred to above. These programs always have increased levels of supervision. In addition, because of the increased supervision, these sanctions are more costly than regular probation. As such, these intermediate sanctions should be viewed from the perspective that because they are limited, the court should carefully select those offenders who need them in conjunction with the Department of Corrections.

It is important to note that the higher the risk an offender presents in the community, the more intermediate sanctions an offender may access. For instance, an offender may be on intensive supervision and electronic monitoring and also be attending the day reporting center. Obviously, because of the cost of these programs, it is important that all the services accessed are necessary. Therefore, the separation of regular probation and intermediate sanctions has to do with cost and level of supervision as indicated by the *special* conditions attached. There is no bright line between regular probation and intermediate sanctions and this fact ought to be considered in sentencing.

### **Form 2 – Sex Offender Matrix**

These are the sentencing and release guidelines to be used for all sex offenders. Specifically, offenses to be considered under this portion of the guidelines include:

- offenses that require registration under Utah Code Ann. § 77-27-21.5(1)(e);
- aggravated kidnapping, § 76-5-302;
- custodial sexual relations or misconduct, § 76-5-412;
- custodial sexual relations or misconduct with a youth receiving state services, § 76-5-413; and
- sexual battery, § 76-9-702(3).

Aggravated kidnapping may be scored on Form 1 if the offense does not involve a sexual component.

### Criminal History Assessment

The Criminal History Assessment is only slightly different than that used under Form 1 for all other offenders. Two additional categories exist on the Criminal History Assessment for sex offenders: Number of Prior Victims and Time Range. The factors related to the likelihood of sex offenders to commit additional sex offenses are specific to a history of sexual deviancy and situations resulting in sexual arousal. The added categories of Number of Prior Victims and Time Range are designed to address these factors. Other than these two additional categories, the Criminal History Assessment for sex offenders should be scored identically to Form 1.

In an extensive study on mandatory minimum sentences for sex offenders, the Sentencing Commission found, among other things, that sex offenders were quite different than other offenders. *See Utah Sentencing Commission Annual Report 1995-1996*; Utah Statistical Analysis Center, *Analysis of Utah's Child Kidnaping and Sexual Abuse Act of 1983*. Mandatory imprisonment, lifetime parole, treatment resources, and the separate guidelines matrix resulted from this study. Form 2 reflects the amended laws mandating imprisonment for certain sex offenders in conjunction with differing indeterminate lengths of stay ranges. In addition, there are only three criminal history rows on the sex offender matrix compared to five on the general matrix. This provides the Board of Pardons and Parole with more discretion concerning sex offenders.

#### *Number of Prior Victims*

This category documents whether the offender had prior victims in any sex offense convictions not including the

present offense. Zero points are allotted for no prior victims, three points allotted for one prior victim, and four points for more than one prior victim in any of these prior sex offense convictions. This victimization does not have to arise out of a single criminal episode. However, before any points are allotted under this section, there must be a specific conviction involving the victim or victims counted.

#### *Time Range*

This category quantifies the length of time the offender has been offending sexually and is based on sex offense convictions. If the offender has any sex offense conviction over two years old, four points are allotted. Three points are allotted if the offender has any sex offense conviction more than one year old and less than two years old. Two points are allotted for any conviction within the last year excluding the present offense, and one point for the present offense. The date of conviction is determinative for purposes of this section.

### Sex Offense Disposition Matrix

The sex offender matrix on Form 2 is obviously different than the Form 1 matrix. However, they both function similarly. Simply identify the appropriate crime category column and intersect it with the appropriate criminal history row to determine the suggested or mandatory disposition. Addendum B lists the crime categories for all sex offenses. Addendum A identifies the appropriate column if more than one sex offense is currently before the court. As with Form 1, the criminal history row is located by calculating the total criminal history score and using the chart labeled "Criminal History Row."

Utah law mandates imprisonment for certain sex offenses regardless of the criminal history score. This is reflected in the crime category columns and the

disposition shading. In rare cases, Utah law does allow for an alternative sentence to prison for otherwise mandatory imprisonment sex offenses. However, an arduous list of circumstances must be met before such a deviation is allowed. These circumstances are enumerated under Utah Code Ann. § 76-5-406.5.

As on Form 1, split cells with dual shading indicate the guidelines recommend either placement.

### **Form 3 - Aggravating and Mitigating Circumstances Associated with Offenses with Three Alternative Minimum Lengths of Stay**

As mentioned, certain sex offenses mandate imprisonment. Utah Code Ann. § 76-3-406. For all but one of these offenses, three alternative minimum terms may be imposed. “[T]he court shall order imposition of the term of middle severity unless there are circumstances in aggravation or mitigation of the crime.” Utah Code Ann. § 76-3-201(7)(a). “In determining a just sentence, the court shall consider guidelines regarding aggravating and mitigating circumstances promulgated by the Sentencing Commission.” Utah Code Ann. § 76-3-201(7)(e). In accordance with the above statutory directive, the Sentencing Commission has, in Form 3, promulgated aggravating and mitigating circumstances for sex offenses with three alternative minimum terms and Form 3 should be used in determining which of those three terms will be imposed by the court. Form 3 is not an exclusive list.

### **Form 4 - Aggravating and Mitigating Circumstances**

There are occasionally circumstances that compel deviation from the guidelines. Some of the more common reasons are listed for convenience on Form 4. Other reasons, as they occur, can be specified. Reasons should always be

specified when the guideline sentence is not recommended. These aggravating and mitigating circumstances should be considered for both Form 1 – General Matrix and Form 2 – Sex Offender Matrix.

In considering all aggravating and mitigating factors in a particular case, the number of each should not merely be added up or otherwise mechanically applied in the balancing process. Rather, the totality of the mitigating factors should be compared against the totality of the aggravating factors. Any one mitigating factor, standing alone, could outweigh some or all of the aggravating circumstances in the case. On the other hand, one aggravating factor, standing alone, could outweigh some or all of the mitigating factors in the case. The guidelines are concerned with the respective substance and persuasiveness of the competing factors, not their relative numbers. Also, do not list an aggravating factor in either form if it is already an element of the offense.

Aggravating factor #2 on Form 4 states “Multiple documented incidents of violence not resulting in conviction.” In order for these “documented incidents of violence” to be counted, there must exist a court approved stipulation that such incidents will be considered. The intent of this requirement, along with having a certain standard of verification, is to assure that all are aware at the time of conviction that such documented incidents will be counted on the guidelines and considered in both the sentencing and release decisions.

### Days of Credit

Time incarcerated under the following circumstances should be counted as time served against the maximum sentence: (1) a conviction is set aside and there is a subsequent commitment for the same criminal conduct; (2) a commitment is made to the Utah State Hospital pursuant to a guilty and mentally ill conviction; (3) time

is spent in custody outside the State of Utah based solely on the Utah warrant; (4) the Board of Pardons and Parole deems such credit just under the circumstances; (5) credit is otherwise required by law. Utah Admin. R671-205-1. No credit is given for time spent in custody at the Utah State Hospital or comparable non-prison psychiatric facility while the offender is judicially declared incompetent.

Guideline Matrix Recommendation

The guideline sentence without regard to aggravating or mitigating circumstances should be documented here.

AP&P Recommendation

The recommendation of Adult Probation and Parole should be documented here.

Reason for Departure

Any reasons for departure should be documented by the presentence investigator in every case in which the guideline recommendation is not followed.